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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1952

No. 383

C-O-TWO FIRE EQUIPMENT COMPANY and MAYNARD A. LASWELL,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit.

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DARK PAGE BLEED THRU

In the Supreme Court
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October Term, 1952

No. _____

C-O-Two Fire Equipment Company and Maynard A. Laswell,
Petitioners,

vs.

United States of America,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The above-named petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United Sates Court of Appeals for the Ninth Circuit entered in the above-entitled cause (R. 242),[1] affirming

[1]Unless otherwise noted all record references are to Vol. I.

the judgment of the District Court for the Southern District of California, Central Division (R. 34).

OPINIONS BELOW.

The findings of fact and conclusions of law of the District Court are at pages 37-48 of the record. No opinion was filed by the District Court. The opinion of the Court of Appeals (R. 220) is reported in 197 F. 2d 489. The dissenting opinion of Pope, J., on rehearing (R. 244) is reported in ____ F.2d ____.

JURISDICTION.

The judgment of the Court of Appeals was entered on May 29, 1952. A timely petition for rehearing was denied, Pope, J., dissenting, on August 11, 1952. On August 28, 1952, Mr. Justice Clark extended the time within which to file a petition for a writ of certiorari to and including October 10, 1952. Jurisdiction of this Court is invoked under section 1254(1) of Title 28 of the United States Code.

QUESTIONS PRESENTED.

1. In a criminal prosecution under section 1 of the Sherman Act may a judgment of conviction be sustained where it rests solely upon circumstantial evidence, without any direct proof of conspiracy, and where each of the circumstances proved consists of a normal, lawful business practice or occurrence which reasonably could

be expected to exist in the absence of conspiracy, and where *all* of such circumstances reasonably could be expected to *co-exist* in a normal competitive market and in the absence of conspiracy?

2. May an inference of criminal conspiracy to fix prices be drawn from the fact that each of a number of competitors follows the practice of selling its products throughout the United States at a single delivered price?

3. May an inference of criminal conspiracy to fix prices be drawn from the fact that each of a number of competitors belongs to and attends meetings of a trade association?

4. May an inference of criminal conspiracy to fix prices be drawn from the fact that each of a number of competitors follows the practice of suggesting resale prices to its dealers?

5. May an inference of criminal conspiracy to fix prices be drawn from the fact that each of a number of competitors manufactures similar products, where the products are ordinary industrial implements and similarity is the result of functional properties and commercial demand?

STATUTE INVOLVED.

The statute involved is section 1 of the Sherman Act (Act of July 2, 1890, c. 647, sec. 1, 26 Stat. 209, as amended).

STATEMENT OF THE CASE.

The petitioners, C-O-Two Fire Equipment Company and one of its vice presidents, Maynard A. Laswell, were indicted on June 15, 1949, together with Walter Kidde & Company, The General Pacific Corporation, American-La France and Foamite Industries, Inc., and two other individuals, in the United States District Court in Los Angeles. Defendants were charged with having conspired to restrain trade in violation of section 1 of the Sherman Act. The conspiracy was alleged to have commenced in January, 1947, and to have consisted of a continuing agreement among the defendants (a) to fix and maintain uniform prices, terms and conditions of sale under which portable carbon dioxide fire extinguishers manufactured by the corporate defendants were to be sold to ultimate purchasers in the Southern California area; (b) to publish and distribute to their dealers price lists at which each of the defendants sold carbon dioxide fire extinguishers to dealers; (c) to require dealers to maintain and adhere to the prices fixed by the defendants; (d) to sell only to dealers who maintained the prices and not to sell to those who did not; and (e) to quote and submit identical bids to public and governmental agencies in the Southern California area and to require their dealers to do likewise.

Three of the defendant corporations and two individual defendants entered pleas of nolo contendere (R. 207). Petitioners C-O-Two Fire Equipment Company and Maynard A. Laswell pleaded not guilty (R. 205), waived a jury (R. 207) and proceeded to trial on October 24, 1950 (R. 51). On February 26, 1951, the District Court

entered judgments of guilty (R. 36-37) and on March 25, 1951, filed findings of fact and conclusions of law (R. 37-48).

On May 29, 1952, the Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court (R. 242). A petition for rehearing was denied on August 11, 1952 (R. 244), Circuit Judge Pope dissenting (R. 244).

This case, a criminal action, is extraordinary in several respects. Not a fact is in dispute. The trial occupied less than a day and a half; the entire record consists of only 112 pages of testimony, two short stipulations of fact, and a relatively small number of exhibits. The evidence introduced by the Government was entirely circumstantial. The sole question involved—whether the circumstances proved are sufficient to support a finding of conspiracy in a criminal prosecution under section 1 of the Sherman Act—is one of law, readily determinable on a short record and without resolution of controverted facts. This primary question, as we point out herein, involves other important questions of law decided ~~we~~ in conflict with decisions of this Court.

In summary, the proof was this:

Industry Background.

The products involved are portable carbon dioxide fire extinguishers, which are manufactured and sold by defendants in sizes (designated "models") ranging from 2 pounds to 150 pounds (R. Vol. II, 200-300). The four defendant corporations (and one other corporation, The

General Detroit Corporation, which owns a controlling interest in defendant The General Pacific Corporation (R. 16)), manufacture approximately 90 per cent of these extinguishers sold in the United States (R. 26-75). The business is relatively small. The total value of all such extinguishers manufactured in the United States is a little over $6,300,000 a year (R. 26). In each of the years covered by the indictment no one of the defendant corporations had annual sales in excess of $2,276,000 throughout the entire United States, nor more than $115,000 in the Southern California area involved in this indictment (R. 26-27).[2]

Patent License Agreements.

Defendant Kidde was the owner of patents covering certain devices embodied in carbon dioxide fire extinguishers. These included the Minor patent issued May 27, 1930 (R. Vol. II, 195-198), which covered an important device essential to the efficient operation of such extinguishers.[3] On August 24 and 25, 1932, Kidde entered into identical patent license agreements with C-O-Two and American-La France, respectively (R. Vol. II, 3, 43),

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[2]The sales figures for the respective companies for 1948 were as follows (R. 26-27):

	Nation wide Sales	So. Cal. Sales
C-O-Two Fire Equipment Company...	$1,489,368.35	$ 34,002.98
Walter Kidde & Co.	2,275,638.23	108,637.11
American-LaFrance Foamite Corp. ...	669,687.29	20,231.70
General Pacific Corporation	299,367.00	87,924.00

[3]For a description of the patented device and its functions, see *Randolph Laboratories v. Specialties Development Corp.* (D.N.J. 1949) 82 F.Supp. 316 (affirmed 178 F.2d 477). In that case the Minor patent was held invalid on the prior art, but only after good faith and sharply contested litigation. The court pointed out that the patented device was an important and essential development.

each of which contained price-fixing provisions (R. Vol. II, 8 et seq., 48 et seq.),[4] and for a period of ten years price schedules under these provisions were in effect (R. 169). On December 30, 1944, General Pacific (which had entered the field in 1942) also acquired a license under the Minor patent (R. Vol. II, 150). This license (unlike the 1932 licenses to C-O-Two and LaFrance) did not institute a price-fixing arrangement but only gave the licensor the right to require sales at fixed prices at a future time and on 60 days' notice, and then only if, before the exercise of such right, this Court had not held such provisions invalid (R. Vol. II, 153).[5]

On August 24, 1942, more than four years before the commencement of the alleged conspiracy in this case, the price-fixing provisions of the license agreements of 1932 were abrogated and were never reinstated (R. 169-171).[6] The right to institute a schedule of prices under the 1944 General Pacific license never was exercised.

Defendants' Consumer Prices.

The Government introduced the available price lists of the defendant corporations from 1932 to 1949 (R. Vol. II,

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[4]While the legality or illegality of these 1932 licenses is immaterial in this case, it is important to remember that at the time they were made this Court recently had sustained the validity of such provisions in *United States v. Gen.Elec. Co.* (1926) 272 U.S. 476, 490.

[5]This provision was embodied in the license while the *Gypsum* case was pending in the district court—four years before the decision of this Court in that case (*United States v. Gypsum Co.* (1948) 333 U.S. 364.)

[6]By letter agreement with Specialties Development Corporation, a wholly owned subsidiary of Kidde, which in the meantime had acquired all of Kidde's rights as owner of the patents (R. Vol. II, 33).

200-300). These lists give each of the defendants' net consumer prices, i.e., the prices at which the respective companies sold direct to consumers. By stipulation it was agreed that each of the defendants suggested that these prices be charged by its dealers.[7]

The price lists show that during the entire period covered by the price-fixing provisions of the license agreements the prices of all defendants were identical, as by contract they were required to be; that, in contrast, for nearly a year following the abrogation of the price-fixing provisions intense price competition prevailed, price changes were frequent, and the prices of the several defendants varied at all times; that thereafter, in the fall of 1943, as the war progressed and prices were under Government control, and with war orders accounting for virtually all production (R. 175), the prices of all defendants reached a common level and continued without change until the end of the war; that after the war and the lifting of price controls, the prices of the several defendants increased from time to time, but at no time simultaneously, and at no time without significant intervals when prices differed during periods of price moves (for record references and a further discussion of these prices see p. 12, infra).

The price lists also show that each of the defendants quoted a national delivered price and that, following the

[7]The Government did not raise any question or introduce any proof as to the prices of any of the defendants at the wholesale level. It conceded at the trial that there were differences between one company and another in the prices of each to its dealers (R. 147).

war and as costs increased (R. 176), the prices of each of the defendants increased from time to time.

Similarity of Products.

As noted above, portable carbon dioxide fire extinguishers are manufactured in different sizes, designated "models." Each of the defendants at all times has manufactured a 10, 15, 50, 75 and 100-pound model. As to other size models (nine in number since 1942) there has been wide diversity in practice among the defendants with respect to the dates on which such models were brought out and the periods during which they were sold. (For record references and a further discussion of these models, see p. 30, infra.) Models of the same size manufactured by each of the defendants are virtually identical in appearance (R. 174).

Trade Association.

It was stipulated at the trial that each of the four defendant corporations belonged to a trade association named "Fire Extinguisher Manufacturers' Association, Inc."; that during the years 1946-1950 each company had employees on the Carbon Dioxide Committee of that association; that at nine specified places and times during the period 1947-1949, this committee held meetings at regular conventions of the association which were attended by various employees of defendants (R. 16-23, 159). There is *no other evidence* concerning this association, this committee, or the activities of either.

Government Bids.

The record contains evidence of three invitations to bid by public bodies during the three-year period covered by the indictment to which two or more of the defendants responded (R. 81-91, 92-95, 95-97, R. Vol. II 323-335, 336-337, 338-341). Each invitation was for a relatively small number of extinguishers by municipal bodies in Los Angeles, and each defendant who submitted bids did so at its current list prices, which at the time were the same.[8] Of the three bids, the two largest in dollar volume were for $3,660 each, for sixty 20-pound extinguishers (R. Vol. II, 336, 338). The other bid called for 104 assorted models of a total dollar value of $2,982.50 (R. Vol. II, 323-324). At the time of these bids the price lists of the defendants showed posted quantity discounts for orders of 25-99, 100-499, 500 and over (R. Vol. II, 203-214).

The record also shows that in two instances C-O-Two dealers, each of whom bid at less than C-O-Two's suggested consumer prices, were admonished by representatives of C-O-Two[9] and thereafter withdrew or attempted to withdraw their bids (R. 116, 120, 132, 134). There was no testimony that any other defendant had knowledge of these instances, or at any time or in any way ever admonished or "policed" any of its dealers.

The Court of Appeals recited each of the foregoing circumstances *seriatim* and found that, when they were

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[8] On one bid American-LaFrance's bid was in excess of its list prices, but this was shown to have resulted from a clerk's error (R. 89).

[9] Or by representatives of the Pyrene Manufacturing Company, which owns 65 per cent of the stock of C-O-Two, and which acts as sales agent for it (R. 166).

considered together, they "spelled out" the "irresistible conclusion" (R. 228) that defendants were guilty of a price-fixing conspiracy.

We submit that this decision is untenable and in conflict with decisions of this Court.

REASONS FOR GRANTING THE WRIT.

The court below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, and has rendered a decision in conflict in material respects with the applicable decisions of this Court and with decisions of the courts of appeals of other circuits.

The decision of the court below announces a new concept of conspiracy, a concept which is both inconsistent with the decisions of this and other courts and contrary to basic principles of criminal justice. The implications were underscored by Judge Pope in his dissent to the denial of rehearing when he observed that "the opinion plows much new ground" (R. 245).

In this case the Government proved that each of the defendants followed a number of separate business practices. These practices are considered separately in the following pages of this petition. The court below held, as to each of certain of these practices, that proof by the Government that all of the defendants followed such practice was sufficient to establish a *prima facie* case of conspiracy to fix prices, thus shifting to the defendants the burden of explanation. In each of these holdings we submit the court below rendered a decision contrary to the decisions of this Court.

The court also held that even if proof by the Government that all of the defendants followed any one of these practices were insufficient in itself to establish a conspiracy to fix prices; still, proof that all of the defendants followed *all* of these practices was sufficient to show conspiracy. As to this we agree with the circuit court that a conspiracy is "not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole" (R. 232). But we do contend that proof of a number of separate and unrelated circumstances (business practices), wholly innocent in themselves, and all of which *reasonably* can be expected to *co-exist* in a state of innocence (a competitive market), cannot furnish the basis for the conviction of crime.[10] And we contend that this is the situation in the case at bar.

A. In holding that the record does not reveal any price competition, "as might be expected," in the industry after the abrogation of the price-fixing provisions of the license agreements, and that such abrogation was "not a thing of substance," the court below so far departed from the accepted course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The only evidence in this record which possibly can be pointed to as linking the several defendants in any conduct is the fact that each was a party to the old license agreements under which the prices of all admittedly were fixed by Kidde, the licensor (supra, p. 7). But the

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[10]As, for example, if the Government should indict three grocers for price fixing, and prove (a) that each charged five cents a package for gum; (b) that each opened his store at 8 in the morning and closed at 6, and (c) that each followed the practice of delivering groceries to the homes of his customers.

record is undisputed that this link was completely and permanently broken.

On August 24, 1942, more than four years before the commencement of the alleged conspiracy, the price-fixing provisions of the licenses were abrogated by formal written agreement (R. 170). Mr. Allen, president of C-O-Two, testified that these provisions "were never reestablished after the date of this letter" (R. 171).

The court below rejected this uncontradicted testimony. It said (R. 237):

> "• • • nor was any evidence introduced to dissipate the inference of conspiracy arising from the history of licensing agreements with minimum price maintenance provisions, save for the bare statement that such provisions were abrogated."

And again (R. 227):

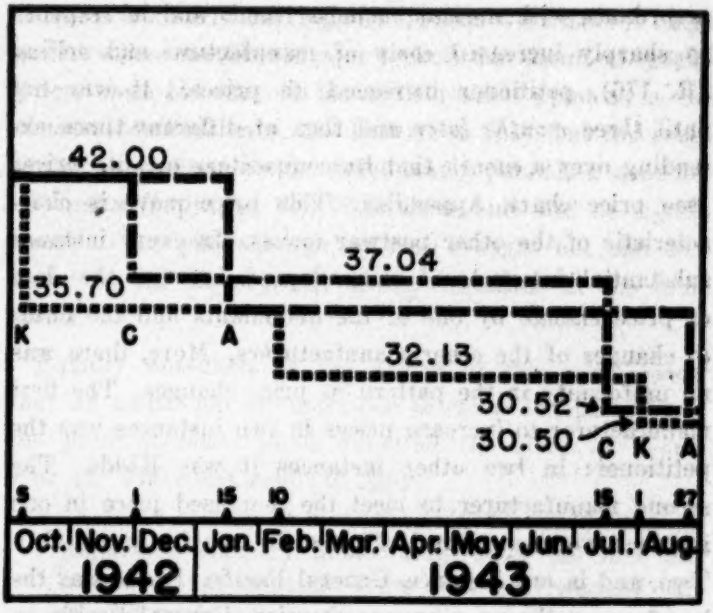
> "The record, however, does not reveal any price competition, as might be expected, in the industry after the alleged abrogation of the price maintenance provision."

The patent and uncontroverted facts are to the contrary.

To this petition, as an appendix, we attach a chart showing the published prices of each of the defendants for the period January 1, 1938, to the date of the indictment, June 15, 1949.[11] This chart demonstrates the integ-

[11]The 10-pound model (the model selected by the Government for charting (R. Vol. II, 352)); the 15-pound model (the largest selling model); and the 100-pound model (the largest model manufactured by all the defendants) are charted. An examination of all the price lists (R. Vol. II, 200-300) discloses that the price pattern as to all other models is no less competitive.

rity of what the court below called the "bare statements" of petitioners. It shows the complete change which occurred in the pricing conduct of each of the defendants after the abrogation of the price-fixing provisions. For four and one-half years preceding the letter agreement of August 24, 1942, there was not one hour of one day during which the price of a single manufacturer for a single model varied by a fraction of a cent—as by contract the parties had agreed. *In contrast, immediately* after *the price-fixing provisions were abrogated an eleven-month period ensued during which there was not one hour of one day in which the prices of all defendants were the* same *for a* single *model.* For convenience, we produce at this point a detail of the pricing chart (on the 10-pound model—the model selected by the Government for charting (R. Vol. II, 352)) covering this eleven-month period.



C-O-Two Fire Equipment Co. C —·—·—
American-La France and Foamite Industries, Inc. A — — —
Walter Kidde and Company, Inc. K ·····

It would be difficult, we submit, to find a more dramatic demonstration of a complete break of a price-fixing agreement.

With this break demonstrated, the conduct of the defendants over the succeeding years appears not only consistent with, but affirmatively shows, a competitive pattern (see price chart, Appendix). Prices reached a common level during the war and remained that way until after the war and the lifting of controls. Thereafter, in

accordance with normal business trends and in response to sharply increased costs of manufacture and selling (R. 176), petitioner increased its prices. It was not until *three months later* and then at different times extending over a month that its competitors met its prices (see price chart, Appendix). This price move is characteristic of the other postwar moves. In every instance substantial intervals of time elapsed between the date of price change by one of the defendants and the dates of changes of the other manufacturers. More, there was no uniformity in the pattern of price changes. The first manufacturer to increase prices in two instances was the petitioner; in two other instances it was Kidde. The second manufacturer to meet the increased price in one instance was American-LaFrance, in two instances, C-O-Two, and in one instance, General Pacific. Kidde was the last to meet the price on one occasion, General Pacific on another and American-LaFrance on still another.[12]

It is true that during most of the time the prices of all manufacturers on these competitive products were the same. But this alone is not evidence of conspiracy.[13]

The fact that on three occasions list prices were quoted for relatively small quantities of fire extinguishers on bids called for by local governmental bodies in no way

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[12]See price chart, Appendix to this petition.

[13]*Pevely Dairy Co. v. United States* (8 Cir. 1949) 178 F.2d 363, 369: "We are clear that mere uniformity of prices in the sale of a standardized commodity such as milk is not in itself evidence of a violation of the Sherman Anti-Trust Act."

United States v. Int. Harvester Co. (1927) 274 U.S. 693, 708-709;

United States v. Standard Oil Co. of New Jersey (E.D. Mo. 1931) 47 F.2d 288, 316-317;

Fort Howard Paper Co. v. Federal Trade Com'n (7 Cir. 1946) 156 F.2d 899, 905.

detracts from this showing. These bids were not for large orders where the Government proved that identical special prices were bid (say to the sixth decimal point as in the *Cement Institute* case, 333 U.S. at p. 713), but for small quantities falling within defendants' published quantity discounts (supra, p. 10). That these bids add no significance to the published prices was brought out and conceded by the Government at the argument in the court below.[14]

Equally untenable is the ruling of the court below that an additional circumstance showing conspiracy was the price increase which followed the close of World War II. The court said (R. 239):

> "• • • *a survey of market conditions* in the fire extinguisher industry immediately after the last war indicates that although there was a substantial surplus of such extinguishers on the market (put there by the government), the defendant corporations increased their prices. Price increases which occur in times of surplus or when the natural expectation would be a general market decline, must be viewed with suspicion. *Yet appellants offer no evidence to dispel doubts as to the legitimacy of their activities.*"

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[14] "Judge Pope: I suppose if they used the list prices in each of those cases they were identical.

Mr. Dixon: That is correct. The Government contends that that is the fact, and there isn't any evidence here to the contrary.

Judge Pope: If, for instance, they did that, I presume we may assume that they quoted those identical prices to private manufacturers who wanted these products • • •. If that is conceded, there isn't anything added to the case, is there, by the fact that when the City of Los Angeles wanted fire extinguishers, they likewise gave identical list prices, price quotations to the City?

Mr. Dixon: No, I believe, Judge Pope, the fact that identical bids were submitted to the City or the County of Los Angeles is entitled to no greater weight than if they were submitted to an individual manufacturer."

Every line of the record bearing in any way upon this statement and the "survey" to which it refers *is on one page*, reading as follows (R. 176):

"The Witness [Mr. Allen]. * * *

Now, we had to get our prices up and I know what applied to us applied to other manufacturers as well.

We had to get our prices up with the lowering of our volume and having to give increased compensation to our different dealers.

We were very, very happy to be able to get our prices up a little bit because we couldn't have existed on the prices that we had during the war.

Q. (By Mr. Lord). There was an unusual condition at the end of the war, was there not, war surplus?

A. Yes, Mr. Lord. As probably everybody knows the Government dumped tremendous quantities of our extinguishers on the market as surplus.

The Court. But that didn't prevent your prices from going up?

The Witness. No, it couldn't. We had to put them up. Their prices are still lower than ours—the surplus material is still being sold at a lower price than we sell it for. You can see them advertised in the Los Angeles papers here every Sunday. A 15-pound extinguisher will sell for $25.00 or $26.00 or $27.00 which is actually, probably, lower than our cost if we put our overhead in it."

Manifestly this testimony cannot be tortured into an application of the so-called "American Tobacco doctrine"[15] or to support a statement that the postwar price increase "must be viewed with suspicion" because made

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[15] *American Tobacco Co. v. United States* (1946) 328 U.S. 781, 805. There the Court pointed out that in 1931, "one of the worst years of financial and economic depression in the history of the

"in times of surplus *or when the natural expectation would be a general market decline*" (R. 239)!

During the war prices of fire extinguishers were at their lowest point, because manufacturing volume was at a peak and sales costs were eliminated (R. 175). After the war, volume dropped and the sales costs incident to civilian distribution were reimposed. The record is uncontradicted that it was because of these increased costs that C-O-Two increased its prices (R. 176). Fifteen-pound fire extinguishers were sold to the Government during the war, in tremendous lots, at $34.35 each, as compared with a prewar price of $49 each.[16] The surplus extinguishers dumped by the Government after the war sold for as low as $25 to $27 each—prices below C-O-Two's actual postwar cost of manufacture (R. 176). It is common knowledge that surplus materials were handled under adverse conditions; that their sales are not accompanied by the customary warranties and service guarantees of new products; that they do not sell at competitive prices with new products.[17]

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country," with "cost to the petitioners for tobacco leaf • • • lower than usual • • • and their manufacturing costs • • • declining," all three of the large tobacco manufacturers, on the same day, raised the list price of their leading cigarette brand. The court added "no economic justification for this raise was demonstrated."

And see: *Cement Mfrs. Assn. v. U. S.* (1925) 268 U.S. 588, 606, where the Court said "an artificial price level not related to the supply and demand of a given commodity *may* be evidence from which such agreement or understanding • • • may be inferred."

[16]R. 175 and price chart in the Appendix to this petition.

[17]Equally untenable, in what the court below seemed to consider a ruling on the "economic" aspects of this case, is its statement (R. 226):

"It is significant that the trial court also found that appellant C-O-Two had no cost records or other data indicating

B. In holding that "Additional circumstantial evidence of the existence of a conspiracy as charged in the indictment is found in the fact that the corporate defendants charged identical consumer prices for their products regardless of where they may be sold in the United States" (R. 237-238), the court below erroneously decided an important question of federal law in conflict with the decision of this Court in Trade Comm'n v. Staley Co. (1945) 324 U.S. 746.

In the case at bar, for the first time in the history of the antitrust laws so far as our research discloses, a fed-

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the manner or method of computing the sale price of the fire extinguishers manufactured and sold by it."

This statement, obviously intended to imply that C-O-Two *must* have relied solely on agreement with its competitors in establishing its prices, finds its sole "support" on two pages of the record—recording a stipulation between counsel (R. 109-110).

Counsel for the Government asked defendants' counsel to stipulate

> "• • • that a subpoena duces tecum was directed to him • • • calling for • • • '• • • all records, including studies, cost analyses, cost surveys, market analyses, statistical reports as well as all correspondence, data, memorandums, records of telephone and other conversations; circulars, announcements, bulletins, reports whether intra-office or otherwise, and all other written material which will show or indicate, (a) the manner or method of computing or arriving at retail prices and, (b) the basis upon which retail price changes were made • • •'"

and to stipulate further that upon receipt of the subpoena defense counsel wrote in reply, suggesting a conference and stating (R. 110):

> "'With respect to the form of subpoena duces tecum which you enclose in your letter, as a result of my inquiries I do not believe that C-O-Two has any materials required by paragraphs 1 and 2 but I do believe that the suggested conference will give you the information which you require and explain the situation in full.'"

The following then occurred (R. 110):

> "[Mr. McGrath, government counsel] I would like those facts be stipulated to.
>
> Mr. Lord: Certainly, your Honor. You mean with respect to the conference, too?
>
> Mr. McGrath: With respect to the conference. I didn't take part in the conference, myself.
>
> Mr. Lord: As I recall the conference was had in New York

eral court has held that where each of a number of competitors in an industry follows the practice of selling its products throughout the United States at a single delivered price, this is "circumstantial evidence of the existence of a conspiracy" to fix prices:

> "Additional *circumstantial evidence of the existence of a conspiracy* as charged in the indictment is found in the fact that the corporate defendants charged identical consumer prices for their products regardless of where they may be sold in the United States" (R. 237-238).

This ruling is not only in conflict with the holding of this Court in *Trade Comm'n v. Staley Co.* (1945) 324 U.S. 746, but is a decision of such far-reaching implications as to warrant, we submit, review by this Court. True the court below goes on to say (R. 238-239):

> "• • • uniformity of delivered price does not in and of itself create inference of collusion, where such uniformity has 'simple and local explanations in the nature of the market, the product and the transportation costs.'"

But the court immediately adds (R. 239):

> "But appellants do not produce any such explanation here."

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at the United States Attorney's office with Mr. Cline.
Mr. McGrath: We will stipulate to that.
Mr. Lord: Mr. Cline?
Mr. McGrath: That is right.
Mr. Lord: Of your New York office?"

It is, we submit, a miscarriage of justice for a court to hold that this record of normal preliminary procedures in working out pretrial problems in an antitrust suit supports a finding that C-O-Two, a corporation engaged in a nationwide business, has no cost records or any other data indicating the method of computing the sale price of its products.

Thus the court holds that the Government establishes a *prima facie* case of criminal conspiracy by showing, without more, that each of a number of competitors charges its customers the same delivered price throughout the country.

Tens of thousands of products in this country are priced at a single national delivered price.[18] A "uniform delivered price at all points of delivery" has been expressly sanctioned by this court:

> "But it does not follow that respondent * * * may not maintain a uniform delivered price at all points of delivery, for in that event there is no discrimination in price" (*Trade Comm'n v. Staley Co.* (1945) 324 U.S. 746, 757).

The citation of and quotation from *Milk and Ice Cream Can Institute v. Federal Trade Com'n* (7 Cir. 1946) 152 F.2d 478, 481, by the court below (R. 238) only adds breadth and serious significance to its decision. In the *Milk and Ice Cream Can* case the members of the industry, acting through an association, adopted a complex and artificial freight equalization plan under which identical prices for each member (regardless of his location) were computed for every delivery point throughout the country. Prices were different at different delivery points. Under this plan the respondents billed the purchaser the f.o.b. plant price plus freight and credited

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[18] A survey of American industry by the Federal Trade Commission a number of years ago revealed that of the firms interrogated, comprising members of thirteen major and other "miscellaneous" industries, more than twenty per cent quoted a uniform national delivered price (F.T.C., Price Bases Inquiry: The Basing-Point Formula and Cement Prices (1932): See for a summary, 15 L. & Contemp. Prob. (1950), p. 128).

the purchaser for the difference between the freight billed *and the freight from the plant of the competitor located nearest to such purchaser.* The credits were computed from freight rate books prepared by the association and distributed to members. Often these books were used only for the quotation of price, and in making the actual shipments and determining the routes the members referred to other traffic information. Daily reports were received with respect to the freight charged and equalized, and deviations from the plan were policed.[19]

It was with respect to this situation that the court in that case said:

> "Just how such an unnatural situation could be brought about by members of an industry without a plan or agreement is difficult, if not impossible to visualize."

But the court below now italicizes and applies this language to the simple practice of each of a number of competitors charging the same price to all of its customers throughout the country—a customary, accepted course of conduct by American business, involving no concurrence in artificial and complex formulae—and holds that proof of such a practice is *"Additional circumstantial evidence of the existence of a conspiracy,"* establishing a *prima facie* case for the Government *in a criminal case.*[20]

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[19]See in addition to the opinion of the Court of Appeals the decision of the Federal Trade Commission, 37 F.T.C. 419, 430 et seq.

[20]The scope of the ruling by the court is emphasized by the fact that in this case the Government failed, even, to produce evidence that freight constitutes a significant portion of the delivered price of portable fire extinguishers. As a matter of common sense, however (while the actual weights of the extinguishers *or*

C. In holding that mere membership in and attendance at regular meetings of a trade association is evidence of conspiracy by the members to fix prices, the court below decided an important question of federal law in conflict with decisions of this Court.

On this point the Government proved *only* that there is an association named "Fire Extinguisher Manufacturers' Association, Inc.," and that during the years 1946 to 1950 each company had employees on the carbon dioxide committee of that association who, at regular meetings of the association, attended meetings of the committee (supra, p. 9). Although the Government preceded the trial with extensive investigation under broad subpoenas (R. 109), it did not introduce one word in the record as to the activities of the association or the committee—not a memorandum, not a line of correspondence, no minutes, no oral testimony—not even a set of by-laws! Yet on this record the court below held that the Government had established that it "cannot be denied" that the defendants, through the association, had created "an opportunity • • • to discuss and agree upon prices and pricing policies on an industry-wide basis" (R. 228), and that this is a "plus factor" which aids in establishing a price-fixing conspiracy.

While the Court says that this fact, standing alone, would not point directly to the conclusion that a price-fixing conspiracy existed, still it treated the circumstance

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the applicable freight rates do not appear in the record), the only reasonable inference is that in the case, for example, of a 2½-pound (hand type) fire extinguisher, retailing for $22, or in the case of a 100-pound extinguisher retailing for $350, freight can hardly be a cost item comparable to the cost of the same item in the case of, say, cement, retailing for around $1.50 per 100 pounds.

of *mere membership* in a trade association as evidence of crime. This is contrary to numerous decisions of this Court and of other courts of appeals, including *Maple Flooring Assn. v. U. S.* (1925) 268 U.S. 563, 583, 584, 586; *Cement Mfrs. Assn. v. U. S.* (1925) 268 U.S. 588, and *Sugar Institute v. United States* (1936) 297 U.S. 553. As stated by this Court in the *Cement Mfrs.* case (268 U.S. at p. 606), proper activities of trade associations

> "are not in themselves unlawful restraints upon commerce and are not prohibited by the Sherman Act."

The decision of the court below simply substitutes a presumption of guilt for the presumption of innocence and right conduct.

Actually, the fact that the Government failed to find and introduce into evidence a single activity of the association which might even be criticized adds strongest credence to the sworn statements of the petitioners that at no time did they discuss or agree upon prices with their competitors (R. 183, 191). And this would seem to be particularly true in an industry dealing with public safety devices where standards of equipment are of concern to insurance underwriters, governmental agencies and industrial groups, and are the subject of detailed municipal, state and federal regulation.

We venture to say that every major industry in the United States has a trade association. The legality of such associations *per se* never before has been questioned. The decision below, as Judge Pope said, certainly "plows much new ground" (R. 245). It is erroneous and in conflict with the decisions of this Court.

D. In holding that similarity in appearance of the industrial products manufactured by each of the defendants is evidence of a price-fixing conspiracy, the court below so far departed from the accepted course of judicial proceedings as to call for an exercise of this Court's power of supervision.

As noted above, models of the same size extinguishers manufactured by the several defendants are virtually identical in appearance (R. 174). This fact, and this fact alone, was held by the court below to establish a *prima facie* case of *a price-fixing conspiracy* in a criminal case, casting on defendants the burden of *going forward with explanatory proof*. Emphasizing the scope of its ruling in this regard, the court said that defendants had failed to give

> "a satisfactory explanation for the similarity in color and other physical characteristics among the extinguishers manufactured by the different corporate defendants. *Appellants make no effort to explain* why these products, although manufactured by different companies * * * were indistinguishable save for their respective labels" (R. 229-230).[21]

No authority even remotely sustains the proposition that proof of similarity of ordinary industrial products *prima facie* establishes a price-fixing conspiracy. Again, the Court's reliance on *Milk and Ice Cream Can Institute v. Federal Trade Com'n* (7 Cir. 1946) 152 F.2d 478 (R.

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[21]The court did hold that the testimony of Mr. Allen, that the companies "are required to meet standards set up by the Underwriters' Laboratories in this respect, that we are required to put out certain sizes in order to obtain certain ratings * * *" (R. 229) was satisfactory explanation of what it called "standardization" in the *size* of the products.

Judge Pope was satisfied, on rehearing, that he had been "too much impressed with the fact of identity of appearance of the products of the several manufacturers" (R. 245).

229) emphasizes its error. In that case the proof may be summarized:

Court of Appeals
152 F.2d 478

The record showed "a continuing effort and urging" on the part of the Institute and its members to have the cans manufactured in uniform classifications. The court said (p. 482):

"The meticulous effort disclosed by the record by which petitioners standardized their products is also a strong circumstance in support of the Commission's finding that their activities were the result of an agreement."

Federal Trade Commission
37 F.T. C. 419, 434

The Commission found that the respondents by agreement eliminated models and styles of cans, changed the design and otherwise standardized the product independently of and beyond any requirements for standardization prescribed by federal or state law. As an example of such agreement it was pointed out that the evidence showed that uniform gauges and weights for milk cans had been worked out after a series of discussions. All respondents were asked to report on which styles and sizes of cans should be manufactured and which ones eliminated. After these reports were in, a committee made a report to a meeting of the Institute members stating the recommendations. These recommendations were adopted by vote. Thereafter from time to time various recommendations were made by the committee to the members at meetings. At a meeting on January 23, 1940, Hunter (secretary of the Institute) pointed out that all members when making improvements or developing some new construction in their equipment should either furnish a sketch of the item or a sample to other respondent members.

The Government made no such showing in this case. It relied upon the *single fact* that these industrial implements are similar in appearance.

Fire extinguishers are not products such as clothing or jewelry, manufactured to appeal to individual tastes. They are industrial tools, functional in nature. As Judge Pope said:

> "* * * no one has ever proposed that an inference of unlawful price-fixing arises from the identity of shovels, hoes, rakes or paint brushes" (R. 245).[22]

The holding of the court below that the burden had shifted and defendants were required to explain "similarity in color" illustrates the extreme of its decision. Similarity in color of fire extinguishers arises from the fact that they are red. While the Government's argument (quoted in footnote ~~21~~ 22) suggests that certain manufacturers, in the absence of conspiracy, might have painted their extinguishers green to test the sales appeal of that color, we submit it is *unreasonable* to conclude that fire extinguishers are painted red by each of several manufacturers pursuant to a conspiracy, and *reasonable* to conclude that without any conspiracy at all they are painted red like fire engines to associate them with their intended use.

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[22]This point was referred to by Government counsel in the oral argument in the court below:

"Judge Pope: I suppose there is no reason why a manufacturer of this kind of product would be interested in getting out an attractive looking extinguisher.

Mr. Dixon: No, I do not think there would be particularly, Judge. I suppose an extinguisher would do the job just as well if it were painted green or some other decorative color, but the fact is whether that would have some sales appeal to some people because it was painted a different color or not, I do not know."

As to other physical characteristics, the horn attached to each extinguisher is a functional patented device to permit the discharge of carbon dioxide without the entrainment of air.[23] In other external physical respects the extinguisher consists of a steel container, cylindrical in form with rounded ends to supply the strength required to withstand the tremendous pressure of the retained carbon dioxide gas.[24] Similarity in these functional respects has no more significance than, for example, the fact that the surface of wings on all airplanes are curved so as to provide a lifting force.

While the foregoing demonstrates the untenable nature of the decision of the court below, we point out that the record *affirmatively* rebuts any possible inference of conspiracy among the defendants to standardize their products. In view of the fact that it takes some time to tool up and put out a new model, it might be said that some inference of previous communication between the defendants might arise if it were shown that new models were put out simultaneously by all defendants. But the price lists introduced by the Government itself disclose that *at no time* during the period involved has a new model been put out at the same time by any two or more defendants. On the contrary, each new model was brought out by one defendant alone, and the other defendants (if any) met this competition by manufacturing similar mod-

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[23]See *Randolph Laboratories v. Specialties Development Corp.* (D. N.J. 1949) 82 F.Supp. 316 (affirmed, 178 F.2d 477).

[24]For a picture of the fire extinguishers of one defendant, see R. Vol. II, 201.

els only after time periods varying from six months to more than a year.[25]

E. In holding that an inference of conspiracy to fix prices can be drawn from the fact that each of the defendants followed the practice of suggesting resale prices to its dealers the court below decided an important question of federal law in conflict with numerous decisions of this and other federal courts.

The court below quoted in full the stipulated fact that each of the corporate defendants followed the practice of suggesting resale prices to its respective dealers and that each dealer "as a matter of sales policy, generally adhered to the published consumer prices suggested" (R. 230). The stipulation further stated that each dealer would testify that "*he* understood" that the defendant manufacturer "required" that such product be sold at the suggested resale prices. The stipulation meticulously referred to the prices as "suggested" prices (a well-understood legal and commercial term significantly different from "agreed upon" prices).

Solely on the basis of this stipulation the court held that the Government had established that "defendant corporations controlled the resale prices of the product" (R. 231) and "agreed not to sell or deliver • • • to dealers who failed to maintain and adhere to the prices • • • agreed upon and fixed by the defendants" (R. 225).

Manifestly the stipulation does not establish even that any manufacturer *acting independently* agreed with its own dealers as to resale prices. But, beyond this, it lends

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[25]This is shown in what we believe is a "self-reading" chart, entitled "Comparison of Models of Fire Extinguishers" attached as part of the Appendix to this petition.

no support to the charge in the indictment, which is that defendants agreed *among themselves* to require their dealers to maintain resale prices.

It cannot be doubted that every manufacturer has an *individual* economic interest in the practice of suggesting resale prices to dealers—an interest that has legal sanction in numerous decisions of this and other federal courts.

United States v. Colgate & Co. (1919) 250 U.S. 300;

U. S. v. Bausch & Lomb Co. (1943) 321 U.S. 707, 729;

Lorain Journal v. United States (1951) 342 U.S. 143, 155;

Adams-Mitchell Co. v. Cambridge Distributing Co. (2 Cir. 1951) 189 F.2d 913, 916;

Chicago Flexible Shaft Co. v. Katz Drug Co. (3 Cir. 1934) 72 F.2d 548;

Harriet Hubbard Ayer, Inc. v. Federal Trade Commission (2 Cir. 1926) 15 F.2d 274.

To hold, as the lower court did, that the suggesting of resale prices for its products by each of a number of competing manufacturers is evidence of a conspiracy among those manufacturers to fix prices, is necessarily in conflict with the cases cited above, since, under these decisions, the Government has proved only that each manufacturer is following a common and approved business practice.

It is apparent from the court's opinion that it was influenced to its holding by the evidence (which occupies most of this record) relating to the two instances when

C-O-Two admonished its own dealers for quoting below C-O-Two's suggested resale prices. But there is not one word in the record which connects this action with any other defendant—no showing of any kind from which any inference can be drawn that C-O-Two acted pursuant to any agreement with any other defendant, or even with the knowledge of any other defendant.[28]

As we have said, the record discloses that the Government made an extensive investigation before the trial of this case. If it had found *any* evidence even remotely connecting any "policing" activities of any defendant with any other defendant, or even if it had found any evidence of "policing" activities undertaken independently by any defendant other than C-O-Two, it certainly would have introduced such evidence. Instead the record is bare.

The indictment here did not charge a "vertical" conspiracy between C-O-Two and its dealers; it charged a "horizontal" conspiracy between C-O-Two and the other manufacturers. Nothing in the action of C-O-Two with respect to its own dealers was connected in any way with the other defendants and has no bearing on the conspiracy alleged.

CONCLUSION.

Each of the actions of each of the defendants proved in this case is a normal business practice characteristic

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[28]Compare *Interstate Circuit v. U. S.* (1939) 306 U.S. 208; *U. S. v. Masonite Corp.* (1942) 316 U.S. 265; *United States v. Gypsum Company* (1948) 333 U.S. 364.

of a competitive market.[27] There is lacking even the most tenuous thread which could be said to connect these separate actions. *All* of them normally and reasonably can be expected to co-exist in a competitive market. They cannot simply be lumped together, contrary to reason and authority, to support a finding of conspiracy.

This is a criminal case. The Government had the burden of proof. Quite apart from the conflict of decisions apparent on the face of the opinion of the court below we urge that this Court, in determining whether

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[27]The indecision of the court below with respect to each of these actions (which it characterizes as "plus factors" (R. 228, 240)) is evidenced in its opinion.

With respect to uniformity of price it says that the

> "• • • question is not whether identical prices throughout the industry in and of itself establishes a conspiracy. We would be deciding the unnecessary to answer that question" (R. 240).

With respect to membership in the trade association it says that this fact "standing alone and examined separately, could not be said to point directly to the conclusion that the charges of the indictment were true beyond a reasonable doubt • • •" (R. 228).

With respect to similarity in the appearance of defendants' products, it is convinced only that this condition "facilitates the maintenance of price uniformity" (R. 229).

With respect to the stipulation regarding resale prices it acknowledges "that there are several legitimate inferences that may be drawn from the stipulated testimony • • •" (R. 231).

With respect to uniformity of delivered prices it hastens "to agree with appellants' statement that uniformity of delivered price does not in itself create inference of collusion • • •" (R. 238-239).

With respect to postwar price increases, it goes only so far as to say that these must be "viewed with suspicion" (R. 239).

With respect to "absence" of cost records, it says that this is "significant" (R. 226).

In this situation, we refer to the language of this Court in *Baumgartner v. United States* (1944) 322 U.S. 665, 670:

> "We cannot escape the conviction that the case made out by the Government lacks that solidity of proof which leaves no troubling doubt • • •."

certiorari should be granted, consider the impact of the court's ruling.

Must all businessmen now charge different prices than their competitors on standard products, even though the history of price changes rebuts any inference of agreement or even prior knowledge?

Must they, in order to avoid "criminal uniformity," refrain from meeting the prices of their competitors?

Must thousands of them abandon their practice of charging a single delivered price throughout the country?

Must they resign from every trade association?

Must each now devise some method to change the shape and style of its ordinary industrial products so as to make them differ from those of their competitors? To achieve this, must essential functional parts be eliminated or redesigned?

In sum, must businessmen artificially and consciously be different to escape the "irresistible inference" that their *normal* similarities are criminal?

We concur in the repeated statements of the courts that the Sherman Act expresses a policy vital to our democractic institutions. We believe it to be a policy endorsed by the overwhelming majority of American businessmen. But the fair objectives of this policy cannot, we respectfully submit, be achieved unless the same scrupulous regard be given to sustaining the fair and normal conduct of businessmen as is given to the condemnation of practices which do not meet that test.

For the reasons above stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Dated, San Francisco, California,
October 3, 1952.

Respectfully submitted,

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(Appendix Follows.)

Appendix

DARK PAGE BLEED THRU

The following schedule sets out the record reference (by page) in Volume II, Book of Exhibits, of price sheets of the defendant corporations from which the comparative list price chart was compiled:

Price Moves	C-O-Two	Kidde	American-LaFrance	General Pacific
No. 1	R. 276	R. 272	R. 274	
No. 2	R. 265	R. 266	R. 267	
No. 3	R. 246 (12/1/42) R. 244 (7/15/43)	R. 249 (10/5/42) R. 245 (2/10/43) R. 243 (8/1/43)	R. 247 (1/15/43) R. 243 (8/27/43)	
No. 4	R. 241			
No. 5	R. 233	R. 236	R. 234	R. 232
No. 6	R. 228	R. 230	R. 225	R. 222
No. 7	R. 216	R. 219	R. 208	R. 217
No. 8	R. 214	R. 205	R. 206	R. 210

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Section 1	2

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 383

C-O-TWO FIRE EQUIPMENT COMPANY AND MAYNARD A. LASWELL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 220-241) is reported at 197 F. 2d 489. No opinion was rendered by the district court. The findings of fact and conclusions of law of that court are set forth at R. 37-48.

JURISDICTION

The judgment of the court of appeals was entered on May 29, 1952, (R. 242), and a petition for rehearing was denied on August 11, 1952 (R. 243).

The time for filing a petition for a writ of certiorari was extended to October 10, 1952, by Mr. Justice Clark on August 28, 1952. The petition for a writ of certiorari was filed on October 7, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether the evidence supports a judgment convicting a manufacturer of carbon dioxide fire extinguishers and one of its officers of conspiring with the other principal manufacturers of such extinguishers and certain of their officers to fix and maintain uniform prices for their products in violation of Section 1 of the Sherman Act.

STATUTE INVOLVED

The pertinent provisions of Section 1 of the Act of July 2, 1890, 26 Stat. 209, as amended (15 U.S.C. 1) commonly known as the Sherman Act are as follows:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * * Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000 * * *.

STATEMENT

On June 15, 1949, an indictment was returned against four corporate and three individual de-

fendants charging them with a conspiracy, in violation of Section 1 of the Sherman Act, to fix prices of portable carbon dioxide fire extinguishers in Southern California (R. 3-12).[1] Three of the corporate defendants[2] and two individual defendants entered *nolo contendere* pleas and were fined (R. 221). Defendant C-O-Two Fire Equipment Co. ("C-O-Two") and Maynard A. Laswell, its vice president in charge of sales—petitioners in this Court—waived a jury and proceeded to trial (*ibid.*). On February 26, 1951, judgments of guilty were entered as to both defendants by United States District Judge Ben Harrison in the Southern District of California (R. 34-37). C-O-Two was fined $5,000, and Laswell was fined $1,000 (*ibid*). At petitioners' request (R. 201-202), the court subsequently entered findings of fact and conclusions of law pursuant to Rule 23(c) of the Federal Rules of Criminal Procedure (R. 37-48).

The indictment charged that since January 1947 the defendants had engaged in a combination and conspiracy to fix and maintain non-competitive prices and terms and conditions relating to the sale of fire extinguishers manufactured by the corporate defendants to ultimate purchasers in Southern California (R. 7-8); that the corporate defendants

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[1] The term "fire extinguishers" is used in this brief to refer to portable carbon dioxide fire extinguishers.

[2] Walter Kidde & Company ("Kidde"), American-La France-Foamite Corporation ("La France"), and General Pacific Corporation ("Pacific") (R. 221).

In 1947 the four corporate defendants, together with General Detroit Corporation (Pacific's parent, Fdg. 4, R. 39), sold approximately 91% by dollar volume of all fire extinguishers sold in the United States (Fdg. 9, R. 41).

had agreed to publish and had published uniform prices at which fire extinguishers would be sold in that area (R. 8-9); that they had agreed to instruct and had instructed their dealers to follow such prices (*ibid.*); that they had policed their dealers to insure the latters' adherence to the published prices (R. 10); and that they had submitted, pursuant to agreement, identical bids for fire extinguishers to both the County and City of Los Angeles (R. 9-10).

The evidence showed—as the district court found—that from 1932 to the return date of the indictment the prices, terms and conditions of sale under which fire extinguishers manufactured by the corporate defendants were sold to ultimate purchasers in Southern California were "substantially identical" except for relatively short periods of time while price changes were being put into effect (Fdg. 18, R. 43; Ex. 8, R. Vol. II, 351), and that there was an "absence of price competition" among the corporate defendants in their sales in that area (Fdg. 28, R. 47).

In 1932 defendants Kidde, C-O-Two and La France were the only manufacturers of carbon dioxide fire extinguishers in the United States (R. 168, 185-186). In August of that year Kidde licensed C-O-Two and La France under its patents (Fdg. 11, R. 41).[3] Under the licenses, Kidde was empowered to and did fix maximum selling prices for its licensees (R. 171). During the ensuing ten

[3] Pacific and General Detroit were licensed under these patents in 1944. Fdg. 14, R. 42.

years, substantially the same prices were charged by C-O-Two, La France and Kidde (Fdg. 18, R. 43). The price-fixing provisions in the licenses were abrogated in August 1942 (R. 169-171; Ex. D, R. Vol. II, 369). For a brief period thereafter, there was some variation among the prices of the corporate defendants, but during the war prices were again identical, presumably as a result of government controls (Ex. 7, R. Vol. II, 344).

The substantial uniformity of prices continued after the war. Prices of all four manufacturers for their 10-pound extinguisher were identical[4] from June 15, 1946, to January 15, 1947 (Ex. 7, R. Vol. II, 344). On that date Kidde raised its price from $42 to $46 (*ibid.*). Identical price increases were made by C-O-Two on February 10, by La France on February 14, and by Pacific on February 15 (*ibid.*). The price of the 10-pound extinguisher remained at $46 until January 1, 1948, when C-O-Two raised its price to $48 (*ibid.*). Within the next two months, each of the other three manufacturers similarly increased its price to $48.00 (*ibid.*). From March 1, 1948—the date when La France brought its prices into conformity with those of the other three manufacturers—to the return date of the indictment, there have been no price variations among the four corporate defendants.

These identical prices were contained in suggested consumer price lists published by each of

[4] The 10-pound model has been selected as a typical illustrative example. Similarly identical prices were quoted by all four defendants on other sizes of extinguishers.

the corporate defendants (Ex. 1, R. Vol. II. 200-232). The same prices were charged to the ultimate consumer whether the fire extinguishers were sold directly by the defendant manufacturers or through their respective dealers (Fdg. 21, R. 43-44; R. 29-30). It was stipulated that each of 16 dealers would have testified that he followed the defendants' suggested consumer prices, that he knew the consumer prices of all the defendants during the period were identical, and that he understood that the defendant manufacturer whose product was being sold "required that such product be sold at the consumer prices published by said defendant" (R. 30).

In May and August, 1948, the corporate defendants or their dealers submitted identical bids for fire extinguishers to the County and City of Los Angeles, respectively (Fdg. 25, R. 45). In each of these instances a C-O-Two dealer submitted a bid containing more advantageous terms than those in the published list prices. Representatives of C-O-Two thereupon policed the non-conforming dealers "for the purpose of compelling said dealers, under threat of refusal to furnish fire extinguishers, to withdraw their bids." As a result of such policing both dealers attempted to withdraw their bids. (Fdg. 26, R. 45-46.)[5]

In one case, bids of $20.50 for 68 extinguishers were submitted by C-O-Two, Kidde and General

[5] In March, 1949, another group of identical bids of $61 were submitted to the City by each of the four corporate defendants (R. 95-96).

Pacific to Los Angeles County (R. 82-83).[6] A C-O-Two dealer, however, offered a 1% discount for cash 10 days (R. 83). After this bid had been submitted, the dealer received a telephone call from a C-O-Two representative in Los Angeles who told him that he had obtained a bid but that "you are the only firm that stepped out of line" since "every other bidder had the same identical price, except you" (R. 132). The C-O-Two representative suggested to the dealer that the bid be withdrawn (R. 138), and as a result the dealer wrote a letter to the county attempting to withdraw its bid because "the material is unobtainable by us at this time" (R. 84).[7]

In the other case identical bids of $61 (for a different size extinguisher) were submitted to the City (R. 92-93). A C-O-Two dealer quoted cash discount 2% thirty days, and was awarded the bid (R. 93). The dealer then received a telephone call from a Mr. Rives, a C-O-Two warehouseman in Los Angeles (R. 167), "asking that we withdraw our bid, and substantially stating we would not be furnished the extinguishers" (R. 114). The dealer sought to withdraw the bid, stating that the "quotation was made in error" (Ex. 1, R. Vol. II, 302), but the City refused to allow him to do so (R. 94). After considerable delay and correspondence (R. 115-120) the dealer finally obtained the extin-

[6] La France submitted a higher bid of $23.10 (R. 83), but this was due to a clerical error (R. 89-90; Ex. 1, R. Vol. II, 307-308).

[7] The County subsequently cancelled the bid (R. 85).

guishers from C-O-Two and made delivery (R. 114, 121).

In addition to identity of price among the four corporate defendants, there was also substantial identity as to terms and conditions of sale. Thus all defendants quoted on a delivered price basis only. Under their pricing system, a Los Angeles purchaser of a fire extinguisher paid the same price whether he bought from Pacific, whose factory was in Los Angeles (R. 31), or from one of the other three defendants whose plants were in New Jersey or New York (*ibid.*) Moreover, all the defendants followed the same quantity discount system, both as to amount of discount and bracket quantities (Ex, 1, R. Vol. II, 200-230).

The extinguishers manufactured by the four defendants were "substantially identical" as to size, color and other physical characteristics, and the models of the different manufacturers were "so standardized that they are generally distinguishable only by the manufacturers' labels contained thereon" (Fdg. 6, R. 39-40; R. 65, 174).

During the period of the conspiracy the corporate defendants were all members of the Fire Extinguisher Manufacturers' Association, Inc., a trade association (R. 17). Petitioner Laswell was a member of and represented C-O-Two on the Carbon Dioxide Committee of the Association (R. 17-18). During the period of the conspiracy at least nine meetings of that committee were held (R. 19-23), at which "an opportunity was * * *

afforded to discuss and agree upon prices and pricing policies on an industry-wide basis * * *" (R. 228). Laswell "instigated, determined, and supervised" C-O-Two's prices and sales policy during this period (Fdg. 27, R. 46; R. 192).

On the basis of the foregoing and other evidence, the trial court found that from May 1947 to the return date of the indictment, all of the defendants were parties to a combination and conspiracy to fix, determine, establish and maintain non-competitive prices, terms and conditions relating to the sale of fire extinguishers to ultimate purchasers in Southern California (Fdg. 17, R. 42; Conclusion of Law, 1, R. 47).

On appeal, the Court of Appeals for the Ninth Circuit affirmed the judgments of conviction (R. 242). The court wrote a lengthy opinion (R. 220-241) in which it carefully reviewed the evidence and concluded that the facts were "inconsistent with any other reasonable hypothesis" than "the guilt of appellants" (R. 241). The court pointed out that in addition to the "admitted price uniformity"—for which the defendants had "not come forward with any satisfactory explanation" (R. 237)—there were a number of other "plus factors" supporting the district court's finding of conspiracy (R. 240). These included (1) a background of "illegal licensing agreements" containing minimum price maintenance provisions, (2) an "artificial standardization" of products, (3) a raising of prices at a time when a surplus existed

in the industry,[8] (4) a policing of dealers to maintain the minimum price provisions in the published price lists, (5) the use of a delivered price system which resulted in identical customer prices no matter where the product was manufactured, and (6) the submission of identical bids to public agencies (R. 240-241).

A petition for rehearing was denied by a divided court (R. 243).[9]

ARGUMENT

1. Petitioners concede that the "sole question involved" in this case is "whether the circumstances proved are sufficient to support a finding of conspiracy in a criminal prosecution under section 1 of the Sherman Act" (Pet. 5). Contrary to petitioners' contention, however, this presents no important general legal issues, but solely the narrow question of the sufficiency of the evidence supporting the judgments of conviction. The trial court, which observed the witnesses, found that the material allegations of the indictment "have been proven beyond a reasonable doubt"

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[8] During the war "most" of C-O-Two's sales were made directly to the Government (R. 175). At the end of the war, the Government "dumped tremendous quantities of our extinguishers on the market as surplus" (R. 176). Despite this surplus, all the defendants raised their prices shortly after the end of the war (*ibid.*). The president of C-O-Two, in describing this situation, stated: "* * * we had to get our prices up and I know what applied to us applied to other manufacturers as well. * * * [the surplus] couldn't [prevent prices from rising]. We had to put them up" (*ibid.*).

[9] Judge Pope, dissenting from the denial of rehearing, stated that he thought there was a "grave question" of the sufficiency of the evidence "to prove guilt beyond a reasonable doubt" (R. 244-245).

(R. 200), and the court of appeals in a lengthy opinion carefully reviewed the evidence and concluded that the "facts are * * * inconsistent with any other reasonable hypothesis" than "the guilt of appellants" (R. 241). This conclusion, concurred in by both courts below is plainly correct, and there is no reason for further review by this Court.

Petitioners analyze separately the principal factors relied on by the court of appeals in an endeavor to show that each factor *of itself* was insufficient to establish the existence of the conspiracy.[10] It is well settled, however—as petitioners concede (Pet. 12)—that the "character and effect of a conspiracy is not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." *United States* v. *Patten,* 226 U. S. 525, 544. We submit that the evidence when viewed in its entirety fully supports petitioners' conviction of a price-fixing conspiracy in violation of the Sherman Act.

Admittedly, the evidence of such conspiracy is circumstantial. But "conspiracies are seldom capable of proof by direct testimony and may be inferred from the things actually done." *Eastern States Retail Lumber Dealers' Association* v. *United States,* 234 U. S. 600, 612. In Sherman

[10] Thus, in discussing the evidence relating to the identical appearance of the products manufactured by the four corporate defendants, petitioners state (Pet. 26): "This fact [identity of appearance], and this fact alone, was held by the court below to establish a *prima facie* case of *a price-fixing conspiracy* in a criminal case * * *" (Italics in original). And see *infra,* p. 15.

Act cases the Government ordinarily "is without the aid of direct testimony" relating to the agreement, and "to establish agreement it is compelled to rely on the inferences drawn from the course of conduct of the alleged conspirators." *Interstate Circuit* v. *United States,* 306 U. S. 208, 221. And "[i]t is not necessary to find an express agreement in order to find a conspiracy." *United States* v. *Paramount Pictures,* 334 U. S. 131, 142.

Defendants' pricing practices during the period 1947-1949 took place against a background of 10 years of admitted price fixing pursuant to patent licensing agreements, during the last 4½ of which, as petitioners put it, "there was not one hour of one day during which the price of a single manufacturer for a single model varied by a fraction of a cent * * *" (Pet. 14). At the end of the war "we [C-O-Two] had to get our prices up and I know what applied to us applied to other manufacturers as well" (R. 176). Accordingly, despite a surplus of "tremendous quantities of our extinguishers" that had been dumped on the market by the Government (*ibid.*), the corporate defendants put into effect identical price increases in January and February of 1946 (Ex. 7, R. Vol. II, 344; R. 179). Thereafter, except for three brief intervals while price increases were being put into effect (*ibid.*), all the corporate defendants maintained identical prices for their products.

These identical prices were charged whether the customer in California bought directly from the manufacturer or from one of its dealers, or

whether the extinguisher was manufactured in California, New York or New Jersey. Cf. *Milk and Ice Cream Can Institute* v. *Federal Trade Commission,* 152 F. 2d 478, 481 (C. A. 7). In addition, identical bids were submitted by all the corporate defendants or their representatives to public agencies, and on at least two occasions dealers who offered terms more favorable than those in the published list prices were policed to correct their deviations. Finally, the products manufactured by each manufacturer were so similar in appearance that their source could be determined only by examining the label.[11]

Petitioners offered no explanation—although the district court repeatedly sought one (R. 174, 175, 179, 192-193)—as to why the defendants all charged the same price, no matter where the product was made, or why a price increase by one was quickly followed by identical increases by all the others. They did not show that the raw material prices or manufacturing and operating costs of all defendants were the same. Cf. *Pevely Dairy Co.* v. *United States,* 178 F. 2d 363, 367-368 (C. A.

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[11] It does not appear that fire extinguishers are simple tools like "shovels, hoes, rakes or paint brushes" (R. 245). On the contrary, they are complex pieces of industrial machinery (Ex. 1, R. Vol. II, 195-198) and one would suppose that in a truly competitive industry manufacturers would endeavor to make their respective products sufficiently distinctive to be easily recognizable and to afford a basis for competitive claims of superiority in characteristics and design. Products such as tank-type vacuum cleaners, for instance, are made sufficiently distinguishable to permit ready identification by the buying public. The identity of the defendants' products, on the other hand, facilitated maintaining identical prices.

8), certiorari denied, 339 U. S. 942. They offered no evidence to explain the joint increases in price, or to show that higher costs, which might have been responsible for the increase by one manufacturer, were identically applicable to all the others.

The foregoing circumstances, coupled with the background of price fixing pursuant to the patent licensing agreements and the defendants' opportunity to discuss and agree upon industry-wide pricing practices at the frequent meetings of their trade association, are clearly sufficient to establish that the defendants "had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful [price-fixing] arrangement * * *." *American Tobacco Co.* v. *United States,* 328 U. S. 781, 810. Petitioners' contention that the evidence disclosed no more than "a normal business practice characteristic of a competitive market" (Pet. 32-33) simply does not stand up in the light of the evidence in the record.

2. The decision below is not in conflict with decisions of this Court or those in other circuits. The alleged conflicts reflect petitioners' erroneous view that the sufficiency of the evidence must be determined in the light of whether each factor of itself is sufficient to show conspiracy, rather than by viewing the evidence as a whole (see *supra,* p. 11).

Petitioners allege that the court of appeals' reliance on the fact that defendants charged identical prices for their products no matter where sold

is in conflict with *Federal Trade Commission* v. *Staley Co.*, 324 U.S. 746 (Pet. 20-23). The issue in the *Staley* case was whether, in a proceeding brought by the Federal Trade Commission under Section 2(a) of the Clayton Act, respondents had sustained their burden of justifying their basing point pricing system by "showing that their prices were made 'in good faith' to meet a competitor's equally low price" (p. 748). There was no charge or finding of conspiracy, or question as to evidentiary support for such a finding, and the case has no relevancy here. Petitioners, in attempting to frame a conflict with the *Staley* case, state that the court of appeals in the instant case "holds that the Government establishes a *prima facie* case of criminal conspiracy by showing, without more, that each of a number of competitors charges it customers the same delivered price throughout the country" (Pet. 22). The opinion of the Court of Appeals makes clear, however, that the court treated this as merely one of a number of "plus factors" (R. 240) which constituted "[a] dditional circumstantial evidence of the existence of a conspiracy * * * " (R. 237).

Similarly without substance is the asserted conflict between the decision below and the cases cited on page 25 of the petition. Contrary to petitioners' contention (Pet. 25), the court below did not treat "mere membership" in a trade association as evidence of crime. The court referred to the trade association committee meetings to show that the defendants had "an opportunity" to "discuss and

agree upon prices and pricing policies on an industry-wide basis * * * " (R. 228). Nor does the decision below conflict with the cases cited on page 31 of the petition. The court below did not hold that it was illegal for the defendants to suggest retail prices to their dealers. It merely concluded that such suggested prices—coupled with the stipulation that the dealers "understood that the defendant manufacturer whose product was being sold *required*" that such prices be followed (R. 30, italics supplied) and the fact that dealers who failed to follow the "suggested" prices were policed—was another link in the evidentiary chain of conspiracy.

CONCLUSION

The decision below is correct, no important question of Federal law is presented, and there is no conflict of decisions. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER, 1952.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1952

No. 383

C-O-TWO FIRE EQUIPMENT COMPANY and MAYNARD A. LASWELL,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

REPLY BRIEF FOR PETITIONERS.

In its effort to support the decision of the court below the Government has been unable to find one word of testimony—one fact in the record—to add to the facts referred to and discussed by us in the petition for a writ of certiorari. Its brief in opposition merely serves, we submit, to emphasize the validity of each point made in the petition.

The sum of the Government's argument is at pages 12 to 13 of its brief. It is there compelled to argue, on the facts of this record, that the following evidence is sufficient to support the finding that defendants, in this *criminal* case, are guilty of an industry-wide price-fixing conspiracy:

(1) The fact that from 1932 to 1942 defendants operated under patent license agreements fixing sale prices for the patented products—notwithstanding that these price-fixing provisions (entered into more than 20 years ago under the sanction of the then recent *General Electric* decision) were repudiated in word and in action in 1942, years before the commencement of the alleged conspiracy in this case (Petition, pp. 13-15; Price Chart, Appendix to Petition).

(2) The fact that defendants increased their prices after the War at a time when the Government was dumping surplus extinguishers on the market—notwithstanding that virtually all of defendants' products were sold to the Government during the War at the lowest prices in the industry's history and that the post-war price increases occurred normally at times of sharply rising costs, and notwithstanding that the surplus extinguishers (which manifestly are non-competitive with new products) were dumped by the Government at prices below petitioners' post-war costs of production (Petition, pp. 17-19).

(3) The fact that, except for "brief intervals" during price moves, the defendants charged the same prices for their products, including prices quoted on three invitations to bid by public bodies—notwithstanding that these

so-called "brief intervals" varied from two weeks to three and one half months,[1] and notwithstanding that the invitations for bids—and there were only three during the years covered by the indictment—were for relatively small quantities of extinguishers, within defendants' published quantity discounts, and the bids were at defendants' published list prices (Petition, pp. 15-17).[2]

(4) The fact that each of the defendants followed the practice of selling its products throughout the country at a single delivered price—notwithstanding that this is a common practice of thousands of American businessmen (Petition, p. 22).

(5) The fact that the products manufactured by each defendant are similar in appearance—notwithstanding that extinguishers are industrial implements, functional in character and design; that there is not a line in the record to show artificial standardization; that the record affirmatively shows competition and independent action in the manufacture and sale of various types of extinguishers (Petition, pp. 26-30; Model Chart, Appendix to Petition).

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[1]These so-called "brief intervals" show diversity of prices, not during hours or days (although even if such short intervals obtained this alone would not show conspiracy—see authorities cited, Petition, p. 16), but during *seven months* of the three and one-half year period from late 1945 to the date of the indictment (Price Chart, Appendix to Petition).

[2]As we point out in the petition (pp. 10, 31-32), the fact that C-O-Two admonished two of its dealers in connection with these bids has *no* bearing on the industry-wide *horizontal* price-fixing conspiracy charged in the indictment. The Government makes no showing to the contrary.

No authority is cited by the Government to support this argument. As far as our research discloses, no authority which could support it exists. Authorities do exist which illustrate the type of showing which has been held sufficient to support a finding of conspiracy: the type of showing made by the Government in other cases involving contentions similar to those made in the case at bar. We summarize a number of these cases (which were relied on by the Government in the court below) in the appendix to this brief. Nothing, we believe, could more clearly demonstrate the total failure of the Government to prove a case here.

The Government's attempt (Brief in Opposition, pp. 14-16) to distinguish the conflicts of decisions pointed out in our petition simply glosses over the actual rulings of the court below and their impact as precedents. Respectfully we urge that our analysis of the decision is correct.

CONCLUSION.

We submit that the judgment in this case is indefensible; that the decision of the Court of Appeals is erroneous and in conflict with the cases cited in the petition; that the decision, unless reversed, will constitute a precedent which will characterize as criminal the normal activities of numerous American businessmen, and which will condone and encourage a slipshod and capricious enforcement of the antitrust laws.

We respectfully submit that the petition for a writ of certiorari should be granted.

Dated, San Francisco, California,
November 13, 1952.

Respectfully submitted,

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(Appendix Follows.)

Appendix

(See p. 4 of this brief.)

The following reviews do not purport to summarize all of the evidence or the issues in each of these complicated cases. They are sufficient, we submit, to emphasize the complete lack of support for the judgment in the case at bar.

United States Maltsters Ass'n v. Federal Trade Com'n (7 Cir. 1945) 152 F.2d 161.

Court of Appeals	Federal Trade Commission 35 F.T.C. 797
1. Basing Point.	
The members at all times quoted and sold malt f.o.b. Chicago plus freight. Freight was calculated from Chicago irrespective of the fact that the plants of the various respondents were located in four different states.	Respondents at all times quoted and sold malt f.o.b. point of delivery. The freight factor was computed on an f.o.b. Chicago basis and in reporting sales to the Association, each member quoted the prices as f.o.b. Chicago (p. 808). At a meeting of the Association held August 5, 1930, it was resolved that a freight rate to all points not previously listed in the freight rate schedule be added thereto (p. 807). At a meeting of the Association held September 11, 1930, the members by resolution agreed to quote only delivered prices or f.o.b. final destination (p. 807).

2. Reports.

The Association received daily reports from the respondents showing the dates of sales, destinations of shipment, grades and quantity of malt sold and the price received f.o.b. Chicago. Similar detailed reports were made weekly and monthly.

The Association had during its entire existence collected and disseminated among the respondents information as to prices, terms and conditions of sale (p. 806).

3. Price Changes.

When a respondent intended to offer malt for a price different from the prevailing posted price, such fact was communicated to the Association, usually by wire, and the information was relayed on to all members, usually by wire.

The court stated (p. 164): "When a member announced an increase in price, that information was flashed by telegram to every other member and they immediately announced a like increase. When a member announced a decrease in price, such announcement was likewise flashed to all other members and they at once proceeded to announce a similar decrease."

At a meeting of the Association on January 10, 1934, it was agreed that each member should send 25 copies of its price list to the Association for distribution to the various members, a practice generally followed until 1940 (p. 808).

Whenever any respondent offered, or proposed to offer, malt at a price other than the price it had theretofore quoted, the member wired or telephoned the Association and advised it of the price "f.o.b. Chicago basis" and the effective date. Immediately thereafter the other members of the Association were advised by wire or telephone (p. 809).

Immediately upon receipt of notification of a change in price, all the other respondent members uniformly adopted such price and immediately notified their customers of the change (p. 810).

Court of Appeals	Federal Trade Commission 35 F.T.C. 797

4. Discounts.

Court of Appeals	Federal Trade Commission
In February, 1938, one of the respondents discussed with the executive committee of the Association the advisability of allowing a cash discount. Up to this time no discount had been offered. Thereafter, this respondent published a cash discount of ½¢ a bushel and all other members immediately commenced quoting an identical discount.	At a meeting of the Association on February 10, 1938, it was resolved that a uniform cash discount should be allowed and it was thereafter given by all (p. 808).

5. Price Uniformity.

Court of Appeals	Federal Trade Commission
	After the organization of the Association the prices of all respondents were at all times identical and uniform for the various grades of malt sold and there was at no time any deviation from prices reported to the Association by any respondent member (pp. 808-809).

6. Policing.

Court of Appeals	Federal Trade Commission
	In order to determine that the respondents were selling malt at the prices reported to the Association, the books of each were checked from time to time by a firm of accountants retained by the Association. Both books and invoices were checked (p. 810).

7. Standardization of Product.

At a meeting of the Association on September 11, 1930, the members adopted grading standards to apply to all sales of malt (p. 807). Again, at a meeting on October 31, 1930, the members resolved to adopt the grading specifications recommended by the Executive Committee of the Association in instances where a "guaranty" of specifications was required (p. 807).

8. Eliminating Competition of Others.

At a meeting of the Association on June 29, 1933, the respondents resolved not to sell to purchasers unless such purchasers agreed not to resell the malt. This practice was thereafter followed by the members (p. 807).

At a meeting of the Association on December 15, 1933, the members resolved not to permit sales agents handling respondents' malt to sell imported malt (p. 808).

Fort Howard Paper Co. v. Federal Trade Com'n (7 Cir. 1946) 156 F.2d 899, cert. den. (1946) 329 U.S. 795.

Court of Appeals | **Federal Trade Commission 38 F.T.C. 282**

1. Zone Pricing.

The zones adopted by the respondents were originally marked out and distributed by the Association under the NRA. The "artificiality and arbitrariness of the zone structure" was so apparent that it "could not withstand the inference of agreement" (p. 907). For example, zone 1 was obviously drawn to include all manufacturers and therefore put them on an equal basis. The companies were located from Wisconsin to the eastern seaboard (p. 906).

In a meeting on August 17, 1933, under NRA it was agreed that the three-zone system should be adopted (p. 289). Then, in a meeting on June 11, 1935, shortly after the decision in the *Schechter* case, the members agreed that they should continue to operate ". . . under the same conditions as were in force prior to the elimination of NRA" (p. 290).

2. Reports to the Association.

Documentary evidence before the Commission disclosed that the Commission was used as a price exchange bureau (p. 907).

At a meeting held on May 17, 1938, it was resolved that copies of orders and invoices should be promptly furnished the Association, and that each member should telephone or wire the Association simultaneously with a change in a published list price (pp. 291-292).

3. Classification of Buyers.

In a meeting on January 17, 1936, it was stated by motion duly passed that a buyer in order to come within the Class 1 classification must conform to certain standards. The list of Class 1 buyers was to be reviewed on January 1 and July 1 of each year (p. 291).

At a meeting on June 2 and 3, 1936, a new form of price structure was adopted eliminating buyer classes 1, 2 and 3 as well as reducing the number of quantity brackets (p. 291).

Finally, at a meeting on May 2 and 3, 1939, the Statistical Bureau of the Association was directed to compile a list of "A" buyers whose purchases averaged over 100 gross a month for a six months' period and a list of "B" buyers whose purchases averaged from 25 to 99 gross over a six months' period (p. 292).

4. Standardization of Product.

At a meeting on November 10, 1936, the executive secretary urged and the manufacturers agreed that the products be standardized as to creping. He stated that excessive ratios had had as bad an effect on the market as a violation of each manufacturer's own published

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Court of Appeals	Federal Trade Commission 38 F.T.C. 282
	price lists and that the stability of the market would surely be wrecked if steps to correct the situation were not "vigorously continued" (p. 291).
	5. Prices and Price Changes.
	At a meeting on June 23-24, 1937, it was decided that when a customer asked that paper be cut, jobbers' prices should be quoted (p. 291).
	Price changes were telephoned or telegraphed to the Association which, in turn, notified all members by telephone or telegraph (p. 291).

Milk and Ice Cream Can Institute v. Federal Trade Com'n (7 Cir. 1946) 152 F.2d 478.

Court of Appeals	Federal Trade Commission 37 F.T.C. 419
	1. The Freight Equalization Plan.
The nature of the freight equalization plan as explained in the Commission's findings, was such that the court stated (p. 482):	Under this plan the purchaser normally paid the freight from the shipper's plant to destination and the shipper then credited the purchaser's invoice for the difference between the freight paid and the freight from the location of the competitor located nearest to such purchaser (p. 431).
"• • • it taxes our credulity to believe, as argued, that petitioners employed this system without any agreement or plan among themselves."	
In addition, the petitioners admitted the plan was used for the express purpose of effecting	

uniform delivered prices. The court went on to say that any doubt on the question of agreement was removed by reference to the minutes of the Institute and other evidence found in the record.

2. Freight Rate Books.

Freight rate books (Climax) were procured by the Institute and issued to the members. The court stated that because of the manner in which the rate books were used, as disclosed in the record, they constituted an integral part of the price fixing combination.

At various meetings Hunter (Secretary of the Institute) suggested and discussed with the respondent members the use of some freight reporting service because of certain errors that were being made by various companies. After approval at an Institute meeting a contract was entered into with Climax Traffic Bureau to prepare and deliver 350 freight rate books to the Institute for distribution to the members. The evidence showed that these books were used simply for quotation of price and that in making actual shipments and determining routes the various respondent companies referred to other traffic information and route books (pp. 432-433).

3. Reports.

Each respondent reported daily to the Institute which had one man, Hunter, who checked continually on deviations in price and called such devia-

At a meeting of the Institute it was discussed and agreed that all members should report at the close of each business day all orders received that

tions to the attention of the appropriate respondent. This reporting system was adopted by the respondents at Institute meetings after general discussions.

day, all contracts entered into that day and all releases made that day against contracts previously reported. The daily reports for metal milk cans showed date of each order, customer's name, address and business, quantity, description, covers, extras, deductions, unit price, discounts, terms and destination, and in addition the freight charged and equalized (p. 430).

4. Buyer Classification.

The Institute established a classification of buyers with a determined discount allowable to each class.

Hunter at a meeting of the Institute submitted definitions of jobbers and dealers and detailed the circumstances under which a customer might come within one of the classifications. These classifications were adopted by the respondents at this meeting. In addition, the members adopted a list of so-called "5-car or more buyers" and discounts to be allowed such buyers. From time to time respondent members made additions to and deletions from this list (although the list was discontinued in 1932) (p. 435).

5. Standardization of Product.

The record showed "a continuing effort and urging" on the part of the Institute and its members to have the cans

The Commission found that the respondents by agreement eliminated models and styles of cans, changed the design

manufactured in uniform classifications. The court said (p. 482):

"The meticulous effort disclosed by the record by which petitioners standardized their products is also a strong circumstance in support of the Commission's finding that their activities were the result of an agreement."

and otherwise standardized the product independent of and beyond any requirements for standardization prescribed by federal or state law. As an example of such agreement it was pointed out that the evidence showed that uniform gages and weights for milk cans had been worked out after a series of discussions. All respondents were asked to report on which styles and sizes of cans should be manufactured and which ones eliminated. After these reports were in, a committee made a report to a meeting of the Institute members stating the recommendations. These recommendations were adopted by vote. Thereafter from time to time various recommendations were made by the committee to the members at meetings. At a meeting on January 23, 1940, Hunter (secretary of the Institute) pointed out that all members when making improvements or developing some new construction in their equipment should either furnish a sketch of the item or a sample to other respondent members.

6. "Seconds."

The Institute through Hunter established rigid rules for the classification and distribution

A complete investigation was had into the extent to which "firsts" were being sold as

Court of Appeals	Federal Trade Commission 38 F.T.C. 419
of "seconds." The record revealed that in some instances some of the respondents had sold "firsts" as "seconds" for the purpose of making an indirect price concession. In these instances the respondent was policed by Hunter.	"seconds" as a hidden discount. Hunter recommended, and the respondents concurred, that the minimum discount on seconds should be increased to make it unprofitable to continue this particular type of price-cutting practice (pp. 435-436).

Triangle Conduit & Cable Co. v. Federal Trade Commission (7 Cir. 1948) 168 F.2d 175, aff'd per curiam (1949) 336 U.S. 956.

Court of Appeals	Federal Trade Commission 38 F.T.C. 534
1. Basing Point Pricing.	
The evidence showed that the respondents for many years had been discussing among themselves the basing point pricing system. From time to time as a result of such discussions, the system had been changed in detail, but on the whole had a continuous existence. The system involved a formula consisting of a base price at either Pittsburgh or Chicago, plus rail freight to every destination in the United States. In order to prevent errors in determining railroad tariff rates, the respondents, acting through the Association, employed one Donley to prepare a schedule, from which it	The Commission summarized (p. 560) the history of basing point pricing in the industry and pointed out that under the formula the price difference between Pittsburgh and any destination was not equal to the freight rate between Pittsburgh and that point. That the various modifications in the basing point system were undertaken pursuant to agreement was documented by the Commission (pp. 560-570). For example, in a letter dated November 20, 1939, written by a representative of one of the respondents, it was stated that the question of whether or not Chicago should be dropped as a base

Court of Appeals	Federal Trade Commission 38 F.T.C. 534
was simple to compute rates to any destination in the United States from either Chicago or Pittsburgh.	was discussed at an Association meeting. The letter contains these words: "Please note this memorandum and destroy" (p. 562).

2. Price Uniformity and Price Change.

In one instance respondents matched their bids to the fourth decimal point on one million feet of conduit for delivery to the United States Navy Department. Other instances of other identical bids were in the record.

Commencing in 1930, respondents adopted a card system of quoting prices. Beginning with card No. 1, all price cards issued by each of the respondents bore numbers identical with those of the corresponding cards of the other respondents, and the cards of all respondents of any given number were identical in all material particulars. (p. 561).

After a complete study by the Association, the respondents adopted, after a joint meeting with jobbers, discounts to be allowed for quantity purchases by wholesalers. The respondents' price cards were simultaneously changed immediately thereafter to reflect these discounts (pp. 577-578).

The evidence showed that the respondents discussed and agreed on what purchasers should be considered wholesalers and entitled to the uniform trade discount (pp. 581-583).

Court of Appeals	Federal Trade Commission 38 F.T.C. 554

3. Policing Activities.

The Association was used to investigate instances of price cutting by its members. Specific examples of extensive policing activities are detailed at pages 578-579.

Eugene Dietzgen Co. v. Federal Trade Com'n (7 Cir. 1944) 142 F.2d 321, cert. den. (1944) 323 U.S. 730.

Court of Appeals	Federal Trade Commission 33 F.T.C. 1130

1. Reports to and from the Association.

Aside from the price lists which are covered under point No. 2 below, the court made no mention of any particular reports which were submitted to or issued by the Association.

The Association collected from and disseminated among the respondents information as to prices, discounts, and terms and conditions of sale. In addition the members filed with the Association schedules of effective prices, including discounts and conditions (p. 1138).

2. Price Uniformity and Price Changes.

Prior to July 10, 1932, the price structure in the industry was completely demoralized. On that date the representatives of several manufacturers met and agreed on a price list to become effective July 10. The prices were considerably higher than those prevailing in the industry. At a meeting late in October, 1935, after the N.R.A. had

At a meeting in June or July of 1932, representatives of the respondents agreed that they would adhere strictly to the price discounts, terms and conditions of sale shown on an approved price list circulated among them at that time. Thereafter, during the next five or six months, other members of the industry joined and

been declared unconstitutional, the members resolved to continue to abide by the code of ethics and stipulated that it was unfair to sell for less than the lowest published price of any member. The same resolution was adopted at a meeting on June 1, 1936 (p. 324).

No rational or satisfactory explanation was made of the evidence showing that the respondents repeatedly made identical bids ranging from $3,000 to $35,000 (p. 327).

followed the prices previously adopted (p. 1143).

At a meeting on June 3, 1935, after N.R.A., the members, by unanimous vote, agreed to continue in force all provisions of the Code with the proviso that the section relating to price fixing should be reworded in a "legally acceptable form" (p. 1144).

At another meeting in October 29, 1935, rules of fair competition were adopted by unanimous vote. These rules provided in part that it would be an unfair practice to "Sell, or offer to sell, products on which price information has been filed and published, at less than the lowest net price filed and published by any member on such product or products; [or] sell, or offer to sell, special products which are covered by his filed and published price lists at net prices more favorable to the purchaser than the lowest filed and published net prices for a similar item of comparable grade" (p. 1145). It was also declared unfair to offer terms more favorable than 2/10 net 30, or to take contracts for a period of more than one year (p. 1145). At another meeting on June 1, 1936, the above provisions with slight amendments were again adopted by unanimous vote (p. 1145).

Court of Appeals	Federal Trade Commission 33 F.T.C. 1130
	Before the meeting in 1932 identical bids were the exception. After the meeting and adoption of the approved price list variation in any bid by a single member of the Association became the exception (pp. 1146-1147). The Commission detailed a number of identical bids made by the respondents during 1936 and 1937 (pp. 1146-1149).
3. Policing Activities.	
The evidence showed that at least on one occasion a respondent wrote to the Association complaining of another member who was cutting prices by varying the agreed-upon standards. In this letter the Association was requested to ask the wayward member for a full explanation of his actions.	The Association was active in the attempt to have its members observe the agreed upon rules and practices with respect to terms and conditions of sale (p. 1146).
4. Eliminating Competition of Others.	
	The Commission found that in some instances where some member of the industry would bid at prices less than those fixed by the respondents, the latter would collusively submit identical bids at prices lower than those that would otherwise be submitted so as to prevent the nonparticipating member from securing any substantial amount of business and to compel such member to become a party to the industry agreement (p. 1138).